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In The
Supreme Court of the United States
October Term, 1988

PETER CHEMA, HENRY SPALLONE, NICHOLAS LONGO & EDWARD FAGAN and CITY OF YONKERS,

Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, et al.,

Respondents.

YONKERS BRANCH NAACP et al.'s BRIEF IN OPPOSITION TO GRANTING OF WRITS OF CERTIORARI

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RESPONDENT YONKERS' BRANCH NAACP et al.'s OPPOSITION TO GRANT OF WRITS OF CERTIORARI

This matter comes before the Court on four separate petitions for writs of certiorari.* For the reasons which follow, all these petitions should be summarily denied.

I. STATEMENT OF FACTS

In November 1985, the district court, Sand, J., held that the City of Yonkers had violated the Equal Protection rights of a class of black and Hispanic persons by concentrating nearly all (97%) subsidized housing in one quadrant of the city and by refusing, for racially motivated reasons, to allow the placement of such housing in white neighborhoods. *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985).

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*Filed by the City of Yonkers; Councilmen Fagan and Longo; Councilman Chema and Councilman Spallone.

On appeal, the Court of Appeals affirmed the City's constitutional and statutory liability in all regards. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987) and this Court refused to entertain the City's petition for a writ of certiorari, 108 S.Ct. 2821 (1988).

On December 15, 1985, more than three years ago, the district court directed the City to submit, within two months, a remedy plan and scheduled comments from the other parties, principally plaintiff, United States, and plaintiff-intervenors, Yonkers Branch NAACP, et al.

In February 1986, the City presented a remedy which contemplated no affirmative municipal action aimed at curing the pervasive segregation found to exist by the district court. Instead, the City submitted that entry of an injunction barring it from engaging in racial discrimination would suffice to remedy the forty year pattern of segregation found below.

Both the United States and the NAACP objected to this limited remedial approach. In the first instance, through two City Council resolutions adopted by its City Council in 1980 and 1982, the City of Yonkers had agreed to site 200 units of assisted housing as a condition for accepting Community Development Block Grant (CDBG) funds from HUD. *See*, 42 U.S.C. 5301, et seq. In March 1984, in a Consent Decree with plaintiff-intervenors, HUD agreed to make available funds sufficient for the construction of 200 units of public housing within ninety days. Notified of the availability of such monies, Yonkers first failed to submit any sites (as it was required to do by its own past promises upon notice of fund availability) for this housing and then submitted two sites HUD found totally unacceptable. By early 1986, Yonkers continued to refuse to provide suitable sites for these 200 units of public

housing. And, now in its remedial proposal, the City continued to provide no suitable sites.

Second, both plaintiffs maintained that the scope of the adjudicated violation—the racially motivated placement of nearly 7,000 assisted units in a one square mile area of minority-dominated southwest Yonkers—demanded affirmative relief broader than the placement of 200 units of public housing in white neighborhoods. Again, Yonkers disagreed and proposed no remedial plan to the district court.

On May 28, 1986, after a six day hearing at which the City was represented by counsel, the district court entered its housing remedy order. *United States v. Yonkers Board of Education*, 635 F.Supp. 1577 (S.D.N.Y. 1986). This order has since been affirmed in full by the Court of Appeals and this Court has refused to entertain any challenges to its validity. *Id.*

By terms of the remedy order, Yonkers was required (a) within 90 days to submit sites for 20 units of public housing and (b) by November 15, 1986 to submit a "long term housing plan" showing how it intended to increase the supply of "affordable" housing in non-minority areas.

Within ninety days, the Yonkers City Council, the legislative body of the municipal government, refused to submit any sites for the 200 units of public housing.[1]

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1. The May 28, 1986 remedy order provided that should Yonkers not timely submit sites for public housing, three sites, Whitman; School 4 and School 15, would be "deemed" submitted to HUD for these units. After the City's default, HUD approved as suitable the first two sites for 160 units of public housing. This left a shortfall of 40 units which were still left unsited.

Likewise, the November 15 deadline for the long term housing plan came and went with only a letter from the City's attorney advising that Yonkers had no intention of complying with the court order and would not present a long term housing remedy plan.

In this light, in late 1986, both the NAACP and the United States sought relief: the United States moved that the City be held in contempt for failure to comply with the May 1986 remedy order and, in addition to such a finding, the NAACP sought appointment of a housing administrator to implement the remedy.

In early February 1987, as Yonkers continued to resist compliance with the remedy order, the district court required the City to retain an "Outside Housing Advisor" (OHA) to identify suitable sites for the remaining units of public housing and to develop a long term housing plan. By April, the OHA had identified a large number of suitable parcels. The Yonkers City Council refused, however, to commit to the submission of these sites to the district court and to HUD and the stalemate continued through 1987.[2]

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2. First, the City Council attached repugnant conditions to any affirmative action, i.e., submission of sites, it was required to take, i.e., rather than providing the housing to those on the Municipal Housing Authority waiting list (90% minority), the City conditioned its compliance on the creation of "neighborhood" tenant selection councils which would select tenants; rather than proceeding with development of the suitable sites and thus fulfilling its longstanding commitment to HUD, the City sought, as price for any cooperation, a stay of its obligations until final review of the merits by this Court. (This condition was demanded after both the Court of Appeals for the Second Circuit and this Court had denied Yonkers' stay motions in June 1986). After the district court rejected these conditions, the City Council announced that it would continue to defy the extant court orders.

By December 1987, the following situation obtained: the OHA, now working exclusively as an advisor to the district court,[3] had recommended the appropriateness of nine privately-owned sites, along with school 4; the Whitman School and another publicly held parcel associated with Lincoln High School, for the construction of 200 units of public housing in semi-detached or townhouse style. The OHA had suggested that six or seven of these sites be used so as to provide "scattered site" low density housing, avoiding an overconcentration of units at any given location. The plaintiffs agreed with this approach and submitted analyses to the district court of the suitability of the nine privately-held sites. In late December, the district court issued an order that Yonkers show at a hearing scheduled for January 8, 1988 what it had done to select sites for the 200 units. As well, the district court made clear its intention to select the sites for the public housing in early January, absent a radical change in conduct by the City.

On December 28, 1987, a unanimous panel of the Second Circuit affirmed the district court's liability and remedy holding "in all respects." *Ibid.* Yonkers retained new counsel and by January 27, 1988, the City Council had approved a Consent Decree apparently resolving the outstanding housing remedy issues. By this Decree, adopted by a five to two vote of the City Council, Yonkers agreed to site the 200 units of public housing on seven

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3. As of July 1987, when it became even more apparent that Yonkers had no interest whatsoever in complying with the court order or with constructively using the services of the OHA, the district court ordered him to report exclusively to it and to serve as the court's expert.

sites; to purchase, through eminent domain if necessary, four of the required sites from their private owners and to implement a long term housing remedy plan, including, adoption by the City Council of an ordinance providing density bonuses and other forms of municipal incentives to developers to facilitate construction of 800 units of assisted housing in economically mixed (80-20) developments in white areas of the City.[4] The City Council also agreed to waive any further rights of appeal which it might have with regard to the housing remedy order.[5] (A-181L-182L)[6] It appeared that a new day of cooperation had dawned in Yonkers.

Appearances can be deceiving. In the next four months, the mood in Yonkers reverted to one of defiance; non-compliance and name-calling. One councilman compared the district court to Stalin and Hilter. A-91g. Another called Judge Sand "anti-Catholic". A third stated on the floor of the City Council that he wished the Judge were struck down and killed. And so it went as Yonkers spiralled into an almost unparalled confrontation with federal judicial authority.

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4. Under this approach, all multi-family developments in white neighborhoods would be required to have 20% of their units at affordable rents or purchase prices, as set forth in the Decree. To make such developments economically feasible, Yonkers agreed to the range of incentives set forth in the First Remedial Consent Decree in Equity. While racial quotas were not contemplated in sales or rentals of this housing, the parties anticipated that the provision of economically diverse housing opportunities would predictably expand housing opportunities for minorities. Moreover, as part of the May 1986 Housing Remedy order, the district court created a Fair Housing Office to provide counselling for those in need of such housing opportunities and to assist in enforcing federal and state statutes prohibiting discrimination in rental and sales.

5. Section 10 of the First Remedial Decree in Equity.

6. Reference is made to the Appendix submitted by Petitioner Spallone.

First, public outcry surfaced concerning Yonker's 'surrender'of its right to seek review by this Court of the liability findings rendered by the district court. The City souht modification of this provision of the Consent Decree.[7] The plaintiffs opposed this motion which the district court denied. Next, Yonkers sought to vacate the entire Decree on the ground that the support of His Eminency, John Cardinal O'Connor, who initially had agreed to donate four acres of church property for the location of some 20 units of public housing, had been integral to the council members' willingness to enter the Decree and that his new-found opposition to the Decree was a "change of circumstance" sufficient to predicate vacation. Again, the district court denied this motion, futilely requesting Yonkers to agree to a site in substitution of the church-owned parcel.

As these legal developments unfolded between February and May 1988, the Yonkers City Council Chambers was turned into a raucous circus. Each meeting was dominated by a white mob which precluded the presence of minority citizens and dominated the proceedings. The City Council members, according to these residents, has sold them out by violating their election year (1987) campaign promises - to resist desegregation through all means available.

Defeated in its efforts to modify or vacate the operate Consent Decree, the majority of the City Council determined simply to abrogate its terms. As sites for public

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7. Of course, notwithstanding its express agreement not to seek such review, the City filed a petition for a writ of certiorari in the Spring of 1988.

housing had already been selected,[8], the resisters attention began to focus on the long term housing plan. In the Consent Decree, Yonkers had agreed to enact a municipal ordinance implementing the long term housing plan. A-184L (Section 17 of First Remedial Consent Decree in Equity). But, council members hoped to win back the confidence of the mob by resisting this measure of compliance.

To this end, in March 1988, the City simply broke off negotiations whith plaintiffs aimed at finalizing language for the required ordinance. The district court then ordered the City to produce a draft ordinance, enactment of which was required by April 28, 1988. The City delayed before producing such a draft. After the parties met and finalized an agreeable draft, the City Council refused to pass the ordinance. In early summer, the district court gave the City Council the opportunity first to amend the proposed ordinance in any manner faithful to the Counsent Decree and then to postpone final passage until after the conduct of a public hearing. The Council continued to balk.

On July 26, 1988, the district court ordered the City Council to pass the ordinance or a resolution of intent to do so after a public hearing within five days or to face contempt of court sanctions. The Council refused by a four to three vote and after hearings conducted on August 2 and 4, 1988, the district court found the four non-compliant council members and the City of Yonkers in civil contempt and imposed fines of $500/day against the individual council members and $100, doubling for each day of non-compliance, against the City. The district court also directed that if, after ten days, non-compliance continued, the individual contemnors would be jailed.

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8. The City appealed neither of these district court decisions.

On appeal, the Court of Appeals upheld the contempt citations against the individual contemnors and the municipality and modified the fine against the City by imposing a maximum daily fine of $1,000.00. This Court upheld the contempt citation and fines against Yonkers, but stayed both the citations and the sanctions against the individual council members.

II. THE PETITION SHOULD ALL BE DENIED

A. THE DISTRICT COURT PROPERLY FOUND AND THE COURT OF APPEALS PROPERLY AFFIRMED THE CONTEMPT OF COURT CITATIONS AND SANCTIONS AGAINST THE CITY AND THE INDIVIDUAL CITY COUNCIL MEMBERS

Petitioners seek review of the Second Circuit's affirmance of the district court's civil contempt citations and sanctions and highlight the following issues:

(a) does the doctrine of absolute legislative immunity shield individual council members from contempt citations and sanctions;
(b) whether the municipality as such was "incapable" of complying with the January 28 Consent Decree and the July 26 order and if, as alleged, it was not,
(c) whether, in any event, the contempt sanction against the City violated the Eighth Amendment's prohibition against excessive fines and
(d) whether the district court abused its discretion by requiring compliance with the terms of the Consent Decree as opposed to implementing those terms itself.

We discuss each question in turn.[9]

1. Legislative immunity does not apply

The Court of Appeals well-reasoned opinion conflicts with no opinion of another Circuit Court nor any precedent of this Court. Indeed, none of the seven cases cited by petitioners implicates any of the issues raised herein. In none of those cases was a legislator held in contempt for non-compliance with a Consent Decree to which he, as an officer of a defendant municipality, was a party. Indeed, each of those cases involves an entirely distinct issue: whether under 42 U.S.C. section 1983 a local legislator may be held individually liable for constitutional torts committed through legislative acts.[10]

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9. Several other issues are mentioned, but these deserve only short consideration. First, there was no difference between the terms of the Consent Decree and the terms of the ordinance required by the district court. Indeed, Judge Sand repeatedly made clear that the Council could submit an ordinance of its own choosing so long as it reflected the previously entered Consent Decree. Moreover, the language presented to the City Council for a vote was worked out by counsel for Yonkers; a planning consultant retained by counsel and plaintiffs. Second, Chema submits that he is being forced into "coerced speech" or is the victim of "prior restraint" on his speech. As the Second Circuit noted, there is no bar to Chema's speech imposed in any manner by the Consent Decree. However, as an officer of the City, Chema is bound to comply with court orders directed against the City, as was the Consent Decree as of entry on January 28, 1988. Moreover, the concept of "prior restraint" has no meaning in this context, as the Consent Decree followed findings of pervasive and gross racial segregation and was intended to rectify that condition.

10. Thus, in *Gorman Towers Inc. v. Bogoslavsky, et al.*, 626 F.2d 607 (8th Cir. 1980), the Eighth Circuit determined that individual local legislators had immunity from lawsuits for money damages brought by citizens aggrieved at the passage of allegedly unconstitutional zon-

Following *Lake Tahoe Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979),

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ing legislation. Of course, that is not the case here, where local legislators were held in contempt for their failure to fulfill obligations undertaken in the Consent Decree, not held subject to damage suits under section 1983.

Likewise, in *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980), plaintiff claimed that an unconstitutional zoning enactment diminished the value of his property. Finding that the act in question was plainly legislative, the Court of Appeals for the Fourth Circuit upheld dismissal of the suit on the basis of absolute legislative immunity. In *Riddle, supra.*, no prior court order required that the legislature act contrary to the manner in which it chose to exercise its authority, the precise factual circumstances presented by the instant case. Clearly, here, Yonkers' legislators had already committed themselves to pass the ordinance in question. Had they not, the district court would have been empowered to enter an order requiring acts necessary to cure constitutional violations. *See*, Proceedings of August 4, 1988, A-83g-87g.

In *Hernandez v. City of Lafayette, La.*, 643 F.2d 1188, 1191-92 (5th Cir. 1981), the Court of Appeals held that in exercising a veto of legislation, a Mayor exercises a legislative perogative, for which absolute immunity fully applies. In *Hernandez*, there was neither a preexisting Consent Decree requiring the Mayor to sign the ordinance in question nor any independent constitutional violation which passage of the ordinance was meant to cure.

In *Kuzinick v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982), the owner of an adult book store claimed violations of due process when local planning officials denied him renewal of an operating permit. The Court of Appeals held that "local legislators have complete immunity from suits based on their legislative acts." In so holding, the Ninth Circuit, *supra.*, at 1350 defined precisely how different that context was from the instant case: "The manifest need for a rule of absolute immunity is illustrated in this case—here legislators are involved in balancing social needs against constitutional rights, the kind of balancing which often produces plurality opinions, and almost always dissenting opinions, in the Supreme Court. These

each Circuit to have considered the issue has extended absolute immunity from suit under sec. 1983 to local

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legislators now find themselves sued for a total of $2,500,000 general damages and $5,000,000 punitive damages by a plaintiff whose business, as nearly as we can determine from the record, has not been shut down one day." Of course, here, the Consent Decree settled the specific means by which Yonkers was to remedy adjudicated constitutional violations. Failure to implement its terms simply carried forward the violation. Moreover, of course, no private party sued the Yonkers' legislators in their individual capacities. Their liability stemmed from their intentional refusal to implement part of the Consent Decree to which they had, as a legislative body, agreed signed onto.

In *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), reviewing challenges to a municipally-inspired campaign to harass and ultimately close hotels catering to Cuban refugees, the Court of Appeals held that imposing liability upon Commissioners for "actions conducted outside their legislative roles does not undermine the policies granting immunity to certain officials." In the absence of legislative action, no immunity could be claimed.

In *Reed v. Village of Sherwood*, 704 F.2d 943 (7th Cir. 1983), a bar owner sued individual elected municipal officials claiming they had interfered with and destroyed the operation of his establishment. For their legislative act of reducing the number of liquor licenses from four to three, the Court of Appeals recognized local legislative immunity. *Id.* at 952. Likewise, in *Aitchison v. Kaffiani*, 708 F.2d 96 (3d Cir. 1983), the Court of Appeals held local legislators immune from suit for wrongful termination. As in the prior cases discussed, in *Reed* and *Aitchinson*, no independent obligation bottomed the liability of the local legislators, i.e., a consent decree or a prior finding of unconstitutional conduct on the part of the municipality the legislators serve as officers.

In short, refusing to hear these petitions would create absolutely no conflict between the Second Circuit and the opinions issued in other circuits. Indeed, the Second Circuit itself generally recognizes legislative immunity, *Star Distributors v. Marino*, 613 F.2d 4 (2d Cir. 1980), but the panel in this case properly distinguished the application of that doctrine from proper judicial sanction where a state legislature has been enjoined "from continuing its defiance of federal court desegregation orders." *See*, A26a.

legislators engaged in legislative activity. We do not challenge the validity of these rulings.

But, their logic does not control this case. Here, the members of the council agreed (by majority vote) to a Consent Decree which included, among its principal terms, municipal commitment to enact legislation implementing the long term housing remedy plan in order to remedy adjudicated constitutional violations. The Consent Decree included the objectives and central elements of that legislation and met all the characteristics of a valid Consent Decree enumerated in *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland,* 106 S.Ct. 3063, 3077 (1986). Rather than comply with this court order, the legislators refused to adopt the implementing legislation. In this context, implementation of the Consent Decree represented a ministerial, not a legislative act. The Council members had already committed, through a majority vote taken on January 27, 1988, to fulfill this act and were not free, as parties to constitutional litigation, simply to flaut this prior agreement meant to cure their violation.

The entry of contempt citations relates properly to the City's failure to fulfill both its voluntarily-made commitment to the federal court and its independent obligation to remedy the unconstitutional condition. *Shillitani v. United States,* 384 U.S. 364, 370 (1966) ("courts have inherent power to enforce compliance with their lawful orders through civil contempt.").

Moreover, the council members can point to no non-pretextual basis for their refusal to follow through on the commitment made to the plaintiffs and to the district court and their action simply intentionally perpetuated the racial discrimination previously found.

While petitioners claim that our constitutional system will be placed in jeopardy by upholding the contempt findings and sanctions against the individual council members, precisely the opposite is the case.[11] The question here is whether individual council members may violate their commitment, freely undertaken, and abrogate a contract made with the plaintiffs, on the one hand, and degrade the power of judicial authority by violating an order to vindicate constitutional rights on the other.

This question cannot, by definition, implicate the cherished freedoms individual council members have to represent their constituents as here the underlying obligation derives jointly from the council majority's own agreement to enter into the January 1988 Consent Decree on the one hand and their contitutional responsibility to cure unconstitutional conditions on the other. Neither of these imperatives—the first contractual and the second constitutional—may depend upon the vicissitudes or the shifting political coalitions of the moment.

Moreover, this case does not threaten this Court's desire, should that be so, to extend legislative immunity to local legislators. It is entirely consistent to hold that when performing legislative acts, i.e., consideration of a zoning ordinance absent the unusual circumstances of this case, legislators may not be sued in their individual capacities and to deny these petitions on the basis that here the City Council, acting through majority vote, agreed to comply with the Consent Decree and then failed to do so, prompting the use of traditional civil contempt sanctions.

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11. As in *Lake Tahoe, supra*, here there is no strong showing that the English common law dictates the grant of legislative immunity to those at the local level. Indeed, viewed through the prism of the "public good," *Id.*, at 404-05, it is clear that insulating Yonkers' council members from responsibility for implementing the Consent Decree would strike a very severe blow to the commonweal.

Failure to honor the terms of a Consent Decree is properly dealt with by entry of a finding of civil contempt and sanctions. *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland,* 106 S.Ct. 3063, 3076 (1986) (Consent Decree enforceable by civil contempt); *United States v. City of Miami,* 664 F.2d 435, 440, n.8, 443. The council members provide no reasoned basis for excepting them from this general rule. The logic of this rule stems from the status of a consent decree—as an order of a federal court. And, disrespect of such a Decree is treated the same as disrespect of a judicially-initiated order.

Just as our society cannot function where private parties are permitted to reneg on agreements freely entered, chaos will break loose and, indeed, be encouraged, if local legislative bodies are not bound by their commitments. What would be the purpose of plaintiffs ever entering into a Consent Decree with a local legislative body if the members of that body can, with impunity, walk away from their agreement without consequence as soon as public antipathy develops to its terms? That is precisely the situation here.

Nor do those who voted against the Consent Decree initially have any more claim to judicial leniency. They, too, are bound by the terms of the Consent Decree as a court order. Contrary to the citations of petitioners, they are officers of the City of Yonkers. They do not stand to this litigation as a non-party union might to a dispute between black firemen and a municipal hiring agency. *Cf. Local 93, supra,* at 3079 ("A court's approval of a Consent Decree between some of the parties cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenors."); *Parklane Hosiery v. Shore,* 439 U.S. 322,

327 (1979) (a "Consent Decree cannot be used as a shield against all future suits by non-parties seeking to challenge conduct that may or may not be governed by the decree.").

Nothing demonstrates the frivolous and distorted nature of these petitioners more than their efforts to treat themselves not as agents or officers of Yonkers, but rather as third party intervenors. The district court has not imposed obligations here on any third party nor bound any third party to the obligations imposed in the decree. *Cf. Ashley v. City of Jackson*, 464 U.S. 902 (dissent from denial of writ of certiorari, Rehnquist, C.J., who noted that whites seeking relief from allegedly illegal consent decree were not parties to the decree or otherwise bound by its terms). Rather, after finding Yonkers constitutionally liable, the district court has accepted a Decree which clearly meets the characteristics set forth in *Local 93, supra*, at 3077. Nor has the court in any manner violated the rule that only "the parties to the decree can be held in contempt of court for failure to comply with its terms." *United States v. Armour & Co.*, 402 U.S. 673, 676-77 (3075-76). Citation to *United States v. Board of School Commissioners of the City of Indianapolis*, 368 F. Supp. 1191, *aff'd*, 483 F.2d 1406, *cert. denied*, 421 U.S. 929 (1975), where the district court observed that it could not enter an order against a non-party, the General Assembly of the State of Indiana, is of no saliency here.

And, once the Consent Decree became final, with Judge Sand's signature, it was as much as the obligation of those parties who opposed it as those who supported it to comport consistently with its terms. That, in short, is the nature of a Consent Decree agreed to by a legislative body.

2. The City of Yonkers Was Also properly Held Liable

Yonkers argues that because of the opposition of four of its seven council members, it could not comply with the underlying court order of July 26, 1988. This is a tautological argument which misrepresents the state of the law and lacks factual foundation.

The City Council is Yonkers' governing body. Its members are agents of the City. Under 42 U.S.C. sec. 1983, a municipality may be held liable for the actions of its decision-makers, the local legislature. *St. Louis v. Prapotnik*, 99 L. Ed., 107, 114 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Owen v. City of Independence*, 445 U.S. 622, 645 (1980) (holding municipality liable under 42 U.S.C. sec. 1983 "for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred or in the executive or corporate duties."). There is thus, in fact and law, no distinction between the City and its City Council.

As a municipality, Yonkers is properly held in contempt here precisely because its City Council - its governing body-has failed to comply with obligations undertaken in a binding Consent Decree, entered after findings of constitutional liability sustained by every reviewing court. Just as "a municipality has no 'discretion' to violate the federal Constitution", *Owen, supra.*, at 649, it has no leave to ignore the dictates of a Consnt Decree agreed to post-liability to vindicate constitutional rights. Nor have its officers - "[a] decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandate and did not weigh a risk that a violation might result in an award of damages from the public treasury." *Id.* at 655-56.

Throughout this litigation, the individual council members had no independent legal representation. They were, all agreed, "the City" for purposes of municipal decision-making. Indeed, recalcitrance and contumaciousness on the part of the majority of that body bottomed the escalating municipal spiral toward non-compliance in 1986 and 1987. Only after the district court made clear that sanctions would be imposed against both the individual council members and the City and after counsel for the City advised that he would not represent the contumacious majority in their individual capacities did these persons retain their own counsel and assert some juridical independence from the "City" of Yonkers. Whatever this maneuvering, it cannot and does not change the essential fact: the City, as the defendant in this action, failed to comply with the outstanding court order and the district court had authority to sanction it.

This is not a situation like those cited by Yonkers in its petition - where a party claims that it cannot comply with an order because of present incapacity. In such instances, either there was no governing body "above" the named contemnor, *Maggio v. Zeitz*, 333 U.S. 56 (1948) or the governing body, it was alleged, likewise lacked present capacity to comply with the underlying order. Here, the governing body of the municipality possessed precisely such capacity and the law countenances no distinction between its capacity to comply and that of the "City".

Nor is there any unfairness to holding the City qua City in contempt for failure to comply with the consent decree. After all, the decree was entered into by the City, not individually by each council member. Moreover, the council members acted defiantly in response to significant pressure from white residents who beseiged City Council meetings demanding continued disobedience to court

orders and to desegregation. For like situation, *See, United States v. United Mine Workers,* 330 U.S. 258 (1946) Where this Court upheld fines against the UMW as well as against the principal strike leader, Lewis. As here, this Court noted in *United Mine Workers,* that more than one officer of the union was involved in assenting to the illegal work stoppage and that Lewis himself represented the will of union members.

By making clear to individual council members that not only would they be sanctioned for continuing noncompliance, but the City would suffer financial ruination, the district court properly calculated those measures which would force compliance, the role of civil contempt.

3. The Fines Against Yonkers Were Not Excessive

The district Court imposed conditional sanctions against Yonkers of $100 for the first day of contempt doubling each day of outstanding contempt. The Court of Appeals modified this sanction by limiting the daily fines to $1,000.000. The City requests review of whether these sanctions violate the "excessive fines" clause of the Eighth Amendment.

As this Court squarely held in *Powell v. Texas,* 392 U.S. 514, 531-32 (1968) the Eighth Amendment was intended to apply to criminal sanctions, not those imposed in civil matters. "The primary purpose of [the Cruel and Unusual Punishment Clause] has always been considered, and properly so to be directed at the method or kind of punishment imposed for a violation of criminal statutes..." The "exclusive concern" of the English version of the Eighth Amendment "was the conduct of judges in enforcing the criminal law." *Ingraham v.*

Wright, 430 U.S. 651 (1977). While our framers were concerned as well with the conduct of legislators and administrators, the subject of the American counterpart was, likewise, "the criminal process". *Id.* at 666.

The very thought of applying that provision in a case where a party has, within its own capacity, compliance and the avoidance of any penalty is irrational and illogical. The imposition of sanction must be intended as "punishment" for the Eighth Amendment to apply. *Id.* at 670, n.39. Here, had Yonkers complied with the Consent Decree, no sanction at all would have been imposed. Had it complied within five days, the total fine would have been less than $3,000. Only because Yonkers chose and could choose to continue non-compliance for a long period can it even pose the question presented. We urge denial of Yonkers' writ with respect to this issue because the "excessive fines" provision of the Eighth Amendment does not properly apply to contempt citations entered to force compliance in civil litigation.

Here, there can be no doubt that Yonkers was subject to civil, not criminal, contempt. As in *Shillitani v. United States*, 384 U.S. 364 (1966) and *Penfield Co. v. Securities & Exchange Commission*. 330 U.S., 585 (1947), Yonkers was not sentenced to a fixed term of punishment, but, rather the district court announced a fine schedule, imposition of which depended on the City's own actions. Yonkers vainly argues that it was subjected to criminal, not civil, comtempt. This is entirely fallacious. Applying the principles set forth by this Court in a long series of cases, this case presents a classic use of civil contempt. *See, Hicks ex rel. Feiock v. Feiock*, 108 S.Ct. 1423, 1430 (sanction remedial and contempt civil, not criminal, if sanction prospective and actor may purge contempt by his own acts); *Penfield, supra.*, at 590; *United States v.*

United Mine Workers, 330 U.S. 258 (1947). Here, contingent sanctions were imposed prospectively. *Maggio, supra.* at 407.

While a schedule of sanctions was announced, its imposition wholly depended on whether Yonkers failed to take the requisite action to purge itself of contempt. Had the City purged itself, the schedule would have ceased to operate and fines would have been suspended. *Hicks ex rel Feiock, supra,* at 1431 ("The critical feature that determines whether the remedy is civil or criminal in nature is not whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the . . . order".)

Understanding this context answers the question presented in another way. Given that the primary purpose of civil contempt is to gain compliance with outstanding court orders, a party's resistance to comply, day after day, with fines mounting, suggests that the level of sanction is, if anything, too modest, not excessive. Here, after this Court refused to stay the imposition of the fines against the City, compliance was achieved within days and the City paid a total of less than $1,000,000 in total fines. Why? The sanctions were effective in (a) insuring the citizenry of the district court's seriousness and (b) causing the municipality to circulate plans for a massive cutback in municipal services, including the curtailment of garbage collection and the lay-off of workers. A lesser sanction would simply have lead to a more protracted state of noncompliance and disrespect for the law. "The dilatory tactics employed [by Yonkers] suggest that if justice were to be done, coercive sanctions were necessary." *Penfield, supra,* at 592.

Finally, the City submits that several Courts of Appeal have determined or assumed that the excessive fines clause applies to civil litigation.[12] It cites two cases upholding the propriety of punitive damage awards even assuming the applicability of this provision. However, neither Court of Appeals determined that the provision does apply to civil litigation, even in the punitive damage context where, concededly, the state purpose is to "punish" the wrongdoer by permitting a jury to use its discretion in setting the quantum of an award.

Whatever considerations might lead this Court to apply the "excessive fines" clause to such a setting, where the state clearly intends the punitive damage award to serve both as punishment and deterrent, the same cannot be said of a fine imposed to gain compliance in civil litigation with an outstanding court order. It bears no relation to punishment.

Thus, contrary to the City's plea, this is a poor and atypical case for this Court to take for the purpose of determining whether the excessive fines clause limits punitive damages in state civil cases. *Cf. Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988) (jury awarded $1.6 million in punitive damages in loss of limb case where insurance company refused to timely pay compensatory damages of $20,000).

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12. *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 04 (2d Cir. 1988); *Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1143, n. 13 (7th Cir. 1987), *cert. denied,* 108 S.Ct. 1302 (1988).

4. The District Court did Not Abuse its Discretion by Requiring Yonkers to Comply with the Consent Decree

Invoking the spector of courts intervening in local legislative functioning or chilling local deliberative processes, petitioners suggest that the district court abused its discretion by requiring the City and its council members to fulfill the obligations freely undertaken in the Consent Decree and by failing to appoint a master. These arguments badly miss the point of this case and would, in fact, cause the federal courts to implicate themselves more, not less, in municipal affairs.

First, the district court clearly acted within its authority in requiring a party to fulfill commitments made in a Consent Decree. Here, plaintiffs bargained for Yonkers to comply with the Constitution and remedy its historic violations, not for the court continually to have to displace local authority to insure vindication of constitutional rights. Plaintiffs sought contempt findings beginning in November 1986 and the district court, if anything, showed undue patience with the obviously recalcitrant city.

Moreover, the court had "acted for" the City on many prior occasions, i.e., submission of sites to HUD for original 200 units of public housing upon municipal default; application for City to HUD for continued receipt of CDBG funds after City refused to submit housing assistance plan required of recipients of federal funds. At some point, the district court properly concluded, Yonkers had to take responsibility for fulfilling its constitutional obligations, not merely allowing its political process to be manipulated and controlled by the white mob.

Second, the district court had before it Yonkers' express agreement to pass the implementing zoning legislation and a draft ordinance endorsed in all particulars by counsel. The ordinance was not self-executing and for the court to ignore Yonkers' continued recalcitrance and simply deem the ordinance enacted falsely suggests its self-implementing nature. As the ordinance, to be effective, needed Yonkers' support, the district court properly resolved to disallow the City from continuing to abdicate fulfillment of its constitutional functions.

Finally, no party doubts that the district court had subject matter jurisdiction and authority to enter the Consent Decree and the Order of July 26, 1988 requiring compliance therewith. *Cf. United Catholic Conference v. Abortion Rights Mobilization,* 56 USLW 4672 (1988) (holding the Court of Appeals required to decide whether district court had subject matter jurisdiction before determining the enforceability of a discovery-related subpoena and the propriety of holding non-party in contempt for failing to honor the same). This is not the appropriate time to challenge the rightfulness of the underlying orders for "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a re-trial of the original controversy." *Maggio, supra,* at 408. So long as a judicial order remains in place, all those governed by its terms must comply or face, as here, the consequences. In light of the assumed propriety of the long term housing remedy ordinance and no one disputes that, the City council members disobeyed its terms at their own risk.

III. Conclusion

The lower courts properly held Yonkers and its council members in contempt for failure to comply with lawful court orders which were required to vindicate constitutional rights. Just as this court directed the lower court to order the Prince Edwards' Board of Supervisors to take affirmative acts necessary to run its public schools in a constitutional manner, *Griffin v. County School Board,* 377 U.S. 218, 233 (1964), here, the actions of the district court were required to insure that Yonkers cure the underlying housing segregation found here to have been caused by intentional racial segregation. Likewise, courts have the authority to order legislatures to appropriate funds to cure constitutional violations, i.e., *Milliken v. Bradley,* 433 U.S. 267 (1977).

The authority to so order carries with it the need and the power to enforce compliance through civil and criminal contempt. Absent the clear grant of such authority to our lower courts, legislators can, with impunity, perpetuate the violation of constitutional rights and continue to pander, as in Yonkers, to misinformed constituents who, in turn, demand non-compliance. The resulting paralysis of the political process merely continues the abridgment of civil rights while it hides or tries to hide behind legal technicalities. Denial of these writs will ad-

vance the end of justice and do so in a manner which is consistent with our nation's highest legal traditions.

Respectfully submitted,

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